BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures.	)	WT- Docket No. 05-211

COMMENTS OF CARROLL WIRELESS, L.P.

Carroll Wireless, L.P. ("Carroll"), by counsel, submits these comments in response to the Commission's Further Notice of Proposed Rule Making in WT Docket No. 05-211 ("Further Notice").[1] There, the Commission sought specific comment on elements of a proposal raised by Council Tree Communications, Inc. ("Council Tree"). *Further Notice*, at para 1. It also explained that it was "consider[ing] whether we should modify our general competitive bidding rules ("Part 1" rules) governing benefits reserved for designated entities ("DEs") (i.e. small businesses; rural telephone companies and businesses owned by women and minorities." Id.

By these comments, Carroll generally supports the thrust of the Commission's proposal, i.e. to fine tune its DE program. More significantly, Carroll also provides input with respect to several of the inquiries posed by the Commission, in order to close off potential loopholes in the Commission DE program without putting at risk the core program that has proven to be generally effective over the last decade.

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[1] Implementation of the Commercial Spectrum Enhancement Act, __ FCC Rcd ___, FCC 06-8, 71 Fed Reg. 6992 (Feb 10, 2006)

I. STATEMENT OF INTEREST

Carroll is a *bona fide* DE that is ultimately controlled by Ms. Allison Cryor DiNardo. It holds sixteen (16) licenses that were awarded pursuant to Auction No. 58.[2] Prior to granting the Carroll licenses, Commission staff in the Wireless Telecommunications Bureau and Office of the General Counsel's office reviewed carefully the Carroll application to assure compliance with the rules – and found there to be such compliance.

A significant component of the staff's review of the Carroll application focused on the relationship between the general partner in Carroll, Carroll PCS, Inc., and the limited partner, U.S. Cellular Corp. ("USCC"). Although USCC holds a considerable equity interest in Carroll, it is Carroll's general partner, and not USCC, that holds both *de facto* and *de jure* control over Carroll. The Commission's grant of the Carroll application confirmed that.

In view of the above, there is no question but that Carroll complies with all existing Commission DE (and other) rules. Nor would there be any issue of non-compliance even if the Commission were to adopt the Council Tree proposal that is at the heart of the NPRM. (This is because the revenues of USCC fall below the caps proposed by Council Tree.) Notwithstanding the above, Carroll urges the Commission to move carefully as it modifies its existing, carefully crafted, and largely successful DE rules.

[2] See Public Notice, DA 06-31, rel January 6, 2006, listing each of the licenses granted to Carroll.

II. DISCUSSION

A. Rules that Permit Entities Such as Carroll to be Designated Entity Licensees are What the Communications Act Requires

At the outset, brief comment on the DE program, as contemplated by Congress and as has been implemented by the Commission to date, appears to be appropriate. When the Congress authorized the Commission to license by auction, it expressly conditioned that authority on DEs "be[ing] ensured the opportunity to participate in the provision of such services."[3] Thus, it is a *sine qua non* for the Commission's auction authority itself. Its existence is not something that Congress left to the discretion of the Commission.

Yet, the Commission does have considerable authority, discretion and control over the nature and structure of the program – so long as it provides the opportunity mandated by Congress. To date, the Commission has, as Congress has demanded, used its expertise and experience with auctions gained over time both to implement a program, then refine it time and again to smooth out unexpected (and largely unforeseeable) wrinkles in the program.[4]

Viewed as a whole, the Commission's program has worked well. It has been responsible for a considerable portion of all licenses granted via auctions being licensed to designated

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[3] Sixth Report and Order in PP Docket No. 93-253, 11 FCC Rcd 136,138 (1995), citing to the Omnibus Budget Reconciliation Act, Pub L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312 (1993) (the "Budget Act"), and 47 U.S.C. § 309(j)(4)(D) and 309(j)(3)(B).

[4] The first significant wrinkle appeared before any broadband auctions took place, when the Supreme Court issued its ruling in Adaradand Constructors v. Pena, 115 S. CT 2097 (1995). Whereas that decision required overall revision of the Commission's DE rules, it did not erase the Congress overall mandate to be supportive of designated entities.

entities. Lest there be any doubt on this point, it must be appreciated that, without the program virtually no licenses of any meaningful value would have been awarded to small businesses.

B. The Commission's Designated Entity Program is Essential to Facilitating Meaningful Participation By Designated Entities.

The Commission's DE program has served well its designed purpose of "ensuring the opportunity to participate" in auctions by designated entities. The Carroll experience aptly illustrates this. Carroll is controlled by a businesswoman who is unquestionably knowledgeable and experienced in wireless matters. Ms. Cryor actively participated in Auction No. 35 and served as the key executive for Black Crow Wireless, L.P., a licensee of five markets. She was also the key executive of X-10 Wireless, L.P., Pine Valley Wireless, L.P., and K-25 Wireless, L.P., all of which developed licenses purchased as a DE. Ms. Cryor also holds a Masters of Business Administration from the University of Virginia's Darden School of Business Administration.

Notwithstanding Ms. Cryor's credentials, without the Commission's DE program, Ms. Cryor would have had no meaningful opportunity to participate in the Commission's auction program. The reason, as the Commission acknowledged generally to be the case with DEs when it established its program, is simple: money! Auction No. 58 illustrates this point. In today's industry environment, a serious applicant must attempt to obtain at least a dozen or so markets to have a meaningful presence. In Carroll's case, sixteen (16) licenses were acquired. In order to accomplish that goal, in Auction No. 58, Carroll was required to provide an upfront deposit of $9,000,000 to the Commission on December 29th, 2004. Then, within 14 days of closure of the auction itself, an additional $120,923,750 was required to be paid to the Commission. Thus, the total spectrum investment by Carroll was $129,923,750.

An investment of that magnitude is not one that a *bona fide* small business can make without partnering with larger, more established carriers.[5] As a general proposition, this is unassailable; it is also a matter that the Commission has formally, and repeatedly recognized. Given the realities of the auction process and system build and operational costs, this is even more compelling. To illustrate: due principally to the extremely high workload before the Commission, the Carroll application was granted on January 6, 2006 – more than one year after the upfront payment had to be made and more than nine months after the full payment had been paid to the Commission for the licenses at issue. Even if a *bona fide* small business could alone come up with the full purchase price of licenses, it likely could not do so under any situation where that considerable investment would have to lie fallow for more than a year, without any licenses being awarded. Most certainly, it could not be done where, as is here the case, operational and build expenses, conservatively estimated to be many times that amount, also need to be paid prior to any revenues being generated.

In short, there can be no genuine dispute that (a) the Act requires that the auction process provide meaningful opportunities for designated entities and (b) without a program such as now exists, no such opportunities would exist.

C. Criticisms of the Commission's Designated Entity Program have been Grossly Exaggerated

It is virtually axiomatic that in today's politically charged environment, accomplishments are largely taken for granted and complications of any nature are magnified. As such, and given

[5] Notwithstanding this, and as the record in Auction No. 58 demonstrates, the controlling entity in Carroll did make considerable equity contributions.

that the DE program (like any other program) has not been perfect, it is not surprising that it has been subject to some public criticism. Yet, from any objective vantage point, several points appear appropriate and necessary to present in order to put matters into perspective. First, the largest, previously existing, flaw in the program (the installment payment process) has long-ago been corrected. Second, the "concentration" argument that is at the focus of the Council Tree submission, is somewhat misleading. Concentration is a fact of life in the industry and is more extensive outside of the DE program than within it. Moreover, even if one takes the position that DE licensees should be viewed as being the same entity as their dominant investors (an assumption that is absolutely mistaken in the case of Carroll and, unless the Commission's careful examination of the DE licensees is inappropriately ignored, is equally inapplicable to all or virtually all other DE licensees), the DE program serves several public interest functions – in addition to ensuring FCC compliance with the Communications Act. It increases service attention to rural and other second-priority markets for nationwide carriers. It also facilitates involvement by women and minorities in wireless. Lastly, by increasing the number of potential bidders, it adds to the competitive nature of the auctions; increases auction revenues; and adds to the overall competitiveness of the industry.

D. The Commission Should Move Cautiously as It Revises its Designated Entity Program.

Carroll does not take issue with the core component of the Council Tree proposal, i.e. that material involvement by the largest national carriers should be limited, and submits that the adoption of this proposal could well strengthen the DE program. Yet, the proposed five million dollar revenue cap appears to be lower than appropriate. More importantly, whatever cap is applied should be locked in as of a fixed date. Alternatively, it should be accompanied by an

automatic index adjustment to address growth over time. Without such provisions, a safeguard that may be valid today could well turn into an unnecessary and unintended restriction over time.

With respect to what constitutes a "material relationship" between a small business and a large investor Carroll submits that, if the concept is to be used at all, the most sensible approach is to very broadly define "material relationship," but provide that it is relevant only to entities over a given revenue cap, as discussed above.

With respect to the question of eligibility of non-carriers, Carroll submits that it would be both impractical and inequitable to single out existing wireless carriers for eligibility restrictions. After all, many of those carriers are in part responsible for current vibrant and competitive state of the wireless industry. Thus, if a revenue cap is to apply to investors of DEs, it should apply across the board to both new and existing wireless carriers.

With respect to the proposal for a net worth cap on individuals, that too seems both unnecessary and impractical. It is impractical because it is very difficult to measure and it would seem to eliminate many entrepreneurs who have been successful in wireless to date – and are the ones who can make a DE program work. It is unnecessary because, regardless of whether one's net worth is one million dollars or one hundred million dollars, he is "small" by virtue of the investment needed for wireless today.

Carroll strongly supports the Council Tree proposal that a third bidding credit level be added. Carroll submits that it should be at least 40%, and should be applicable to all applicants having less than one million dollars in attributable average annual revenues. In this regard, with the absence of any closed bidding, this greater credit is needed to permit designated entities to compete generally with larger carriers. Moreover, although closed bidding is not now applicable

for the AWS Auction, the Commission should clarify that this is a viable option for future auctions – especially if other DE provisions do not provide adequate protection to permit designated entities to have meaningful success in the auction.

Lastly, with respect to the Council Tree urging that the Commission expand its unjust enrichment rules to guard against future impermissible future relationships, Carroll submits that existing protection already exists on this issue and that no increased regulation is needed or appropriate.

III. CONCLUSSION

The Commission's DE program is not "broken." Many of the proposed fixes that Council Tree has proposed are unnecessary. As the Commission plots its DE course for the future, it should assure a continuing role for DEs and should proceed cautiously with any changes. Should it limit investor participation by virtue of investor revenues, it should provide a mechanism so that future year revenues are not measured against a current year cap. Any investor revenue caps that are instituted should apply to both new and existing carriers. Lastly, Carroll supports the proposal to increase the bidding credit amounts and believes that such increases are particularly needed in the event there are no closed bidding opportunities.

Respectfully Submitted,

CARROLL WIRELESS, L.P.

By: Thomas Gutierrez, Esquire
Lukas, Nace, Gutierrez & Sachs Chartered
It's Attorney

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